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SHRINK-WRAP LICENSES OF MASS MARKETED SOFTWARE: ENFORCEABLE CONTRACTS OR WHISTLING IN THE DARK?

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INTRODUCTION

"Shrink-wrap," "box-top," or "tear-open" licenses are a new form of quasi-consensual agreement spawned by the needs of our computer society, or more precisely by the economic needs of mass marketers of software. These licenses are printed documents found in mass-marketed, packaged software (typically in a plastic, shrink-wrap container), which state that, by tearing open the package, the customer consents to the terms of the license agreement.[1]

The use of these licenses has thus far been confined to mass-marketed software sold to businesses and consumers. Such software is rarely priced over $500, and does not lend itself to individual bargaining over contract terms. By contrast, custom software and other software priced over $1,000 is usually marketed on the basis of individually negotiated contracts in which the customer actually signs on the dotted line, rather than signifying consent by tearing open a package.[2]

The stated concern of software proprietors that led to the adoption of shrink-wrap licensing is "software piracy," by which software proprietors mean unauthorized and uncompensated copying and use of their software.[3] Such software is marketed in impersonal transactions— via mass distribution channels—to a multitude of persons who have no continuing relationship to or interest in the software proprietor. The price of the software is quite high relative to the cost of its duplication, which is relatively easy and undetectable. The business setting, therefore, is ideal for "piracy."

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1. Five of these licenses are appended following this article. See *infra* apps. I-V.

2. These contracts, however, are also often standardized or relatively inflexible.

3. *See, e.g.*, Sanger, *The Gavel Comes Down on Computer Copycats*, N.Y. Times, Oct. 23, 1983, § 3, at 8, col. 3.

To make matters worse, many end users are, to some degree, hostile to software marketers, believing that they charge consumers far too much for what they deliver.[4] Software proprietors consider that this feeling leads many end users to disregard their property rights.[5]

While software proprietors must distribute their products in the setting described above, they also face high front-end costs of bringing software to the market. Piracy dilutes the return on their investment, and to the extent that the return on investment, therefore, falls below alternative investment opportunities, less software becomes available to the public. The shrink-wrap license is one perceived solution to these problems.

The following groups often are accused of software piracy: counterfeiters—commercial copyists and mass marketers of pirated software; software "rental" companies; user groups, club lending libraries; individual users who borrow and copy software from one another; and end users with multiple central processing units ("CPUs")[6] who "overuse" the software. Shrink-wrap licensing is probably ineffective against most of them.[7]

Detecting piracy in individual or corporate end user contexts is extremely difficult, and detection rarely occurs.[8] On the other hand, software rental companies are necessarily visible because they must ad-

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4. *See, e.g.*, Bulkeley, *Software Firms Urge Big Buyers to Curb Illegal Copying of Programs by Employees*, Wall St. J., Oct. 23, 1984, at 31, col. 3 (president of one software company states, "Usually, piracy is a problem where software is overpriced.").

5. *See, e.g., id. Cf.* Barron, *When Neighborliness Turns High Tech*, N.Y. Times, Sept. 22, 1983, § 3, at 1, col. 1 (commenting on the advantages of having a neighbor with a computer, one computer owner stated, "I can buy a couple of programs and he can buy a couple and we can share and defray the software costs.").

6. A "CPU", or "central processing unit" is the part of a computer which contains circuitry for performing arithmetic and logic operations, and related circuitry for storing data and programs and making them available at appropriate times.

7. Counterfeiters are surely no more concerned about breach of contract than about copyright infringement, so that shrink-wrap licenses do not impress them at all. Individual users who borrow copies of computer programs from one another may show some respect for these contracts, although this is uncertain. *See supra* notes 4, 5 and accompanying text. End users with multiple CPUs are likely to be business concerns who probably do show more respect for contracts and the claimed property rights of others. *But cf.* Lotus Dev. Corp. v. Rixon, Inc., Civ. No. 84-278-C (D. Mass. Sept. 20, 1984) (dismissed without prejudice), *infra* note 8.

8. A recent highly-publicized action involved the allegation that one of defendant's officials circulated a dozen copies of the Lotus 1-2-3 data base computer program to subordinates in the company, instructing them to use it for report generation. Lotus Dev. Corp. v. Rixon, Inc., Civ. No. 84-278-C (D. Mass. Sept. 20, 1984) (dismissed without prejudice), *discussed in* 2 COMPUTER L. REP. 1036 (May 1984).

vertise to reach the market, and clubs or user groups may also disclose their existence and activities.

This raises several questions. First, if piracy is the real problem, is shrink-wrap licensing an effective tool to deal with it or just a blunt instrument? Second, if shrink-wrap licensing is not really effective against most piracy, why is it used? Are there unstated reasons that would better explain its use? Third, do different clauses have different rationales? Fourth, are some clauses more likely to be enforced than others? This article will present a detailed examination of these issues.

I. TYPICAL CLAUSES OF SHRINK-WRAP LICENSES

The two most important shrink-wrap license clauses are the shrink-wrap clause itself and the retention of title clause.

The Shrink-Wrap License Clause

The *pièce de résistance* of any shrink-wrap license is the shrink-wrap license clause. This clause states that the customer agrees to the terms of the license by tearing open the wrapping. MicroPro's clause is typical:

> You agree to the terms of this agreement by the act of opening the sealed package. . . . Do not open the sealed package without first reading, understanding, and agreeing to the terms and conditions of this Agreement. You may return the software for a full refund before opening the sealed package.[9]

Most of the others follow a similar format.[10]

Retention of Title Clause

The most widely used restrictive clause, and the one most relied upon to prevent rental and other practices of which software proprietors disapprove, is retention of title. Under this clause, the customer agrees that he or she is merely a bailee or lessee of the software or diskette,[11] rather than an owner of it. Ashton-Tate's dBASE II license is the most explicit on this point:

> You acknowledge that the Materials [defined as dBASE II, the User Manual and related materials] are the sole and exclusive property of

9. *Infra* app. III.

10. *See, e.g., infra* app. I; *infra* app. II; *infra* app. IV; *infra* app. V.

11. A diskette or "floppy disk" is a thin sheet of magnetic material (typically about five inches in diameter) in which the program is encoded.

> Ashton-Tate. By accepting this license, you do not become the owner of the Materials, but you do have the right to use the Materials as outlined and limited in this agreement.[12]

Other software proprietors' shrink-wrap licenses are more oblique. MicroPro states that the software is the sole and exclusive property of MicroPro, but does not define "software."[13] Microsoft states that it grants a "non-exclusive right to use the enclosed program,"[14] but does not expressly claim to own the diskette. Peachtree (PSI) grants a non-transferable and non-exclusive license to use the program but states that PSI retains title, ownership and documentation of the program.[15] Lifetree also asserts ownership of the recorded software.[16]

Except for Ashton-Tate's, these clauses could be interpreted by an unsympathetic court to have little or no effect on piracy.[17] On the other hand, a court might be sympathetic in a case of true piracy and give such clauses the meaning that the software proprietor intended. Of course, whether the court would, then, enforce the clause in accordance with that meaning is a separate question.[18]

Other Clauses

Other commonly used restrictive clauses in shrink-wrap licenses prohibit rental of the software;[19] prohibit modifications of the software,[20]

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12. *Infra* app. I.

13. *Infra* app. III.

14. *Infra* app. IV. Microsoft has recently introduced a modified license agreement—a "break the seal" license—which consists of an envelope attached to the outside of the software package. This arrangement allows the purchaser to read the document *before* opening the package.

15. *Infra* app. V.

16. "LSI shall at all times retain ownership of the software recorded on the original diskette. . . ." *Infra* app. II.

17. For example, the court could rule that the software proprietor owns the computer program, in the sense that it owns the intellectual property rights to the program, just as the owner of a copyright in a novel owns the literary work (as an intangible), but does not own the book or other tangible physical object in which the work has been fixed. Hence, the software proprietor's retention of ownership of the software, which is guaranteed already by The Copyright Act of 1976, 17 U.S.C. § 202 (1982), gives it no rights in the material object in which the software is fixed.

18. What Microsoft, Peachtree and Lifetree mean, or ought to mean in order to accomplish the result they seek, is that they own the diskette and the customer is just a bailee. Even if a court interpreted their oblique language in that sense, nonetheless, the court might well refuse to place any weight on an apparent seller's denial that it sold the diskette to its apparent purchaser.

19. *See infra* note 26 and accompanying text.

20. *See infra* notes 73-74 and accompanying text.

its incorporation into other computer programs,[21] and its disassembly;[22] and limit use of the software to a single CPU.[23] It is not helpful to address the enforceability of all of these clauses *en masse*. Different clauses raise different policy questions and call for different trade-offs. This article, therefore, now turns to a series of separate discussions of the various typical clauses.

II. ARE THE AGREEMENT AND THE RETENTION OF TITLE CLAUSE EFFECTIVE?

There are serious questions as to whether the centerpieces of shrink-wrap licensing—the "agreement" itself and the purported retention of title to something—are effective. As a matter of ordinary contract law, the offer and acceptance are murky. The idea that opening a package (obviously a necessary condition of the customer's getting any of the benefit of the bargain of the transaction) constitutes the customer's assent to an often confusing piece of legal verbiage, is unsettling. So, too, is the imposition of a bilateral contract by one party's "notice" to the other. The Uniform Commercial Code raises further questions.[24] Obscure drafting, the *contra proferentum* rule, and doctrines against standardized contracts or adhesion contracts muddy the waters. Title cannot always be retained simply by saying that it is. Rights cannot always be created by symbolic actions aimed at a remote party several steps down the distribution chain and not in privity of contract with the software proprietor.

This article will focus on non-contract considerations. However, the ineluctable fact is that none of the restrictive shrink-wrap licensing clauses are enforceable against anybody, whether the consumer end-user or a third party with notice of the clauses, if there is no legally recognized agreement between the consumer end-user and the shrink-wrap licensor.[25] Moreover, many of the restrictive shrink-wrap licens-

21. *See infra* section on *No-Incorporation Clauses*.

22. *See infra* note 85 and accompanying text.

23. *See infra* note 90 and accompanying text.

24. For example, such a contract might be held unconscionable in a consumer transaction under U.C.C. § 2-301.

25. Under our system of law, a duty against an alleged obligor can be enforced only when there is either a promise from the obligor to the obligee, directly or on a third party beneficiary basis; or a duty decreed by statute, tort law or property law. Neither of these is unambiguously applicable here. In this context, the promise theory is the least improbable, but it requires an agreement. If the consumer end-user has made no agreement with,

ing clauses fail if the software marketer cannot retain title in a transaction that looks very much like a sale.

Ominous as all that may sound for shrink-wrap licensing, the outcome in any real lawsuit is more likely to turn on the business rationale of the restrictive clause, and the way it affects other persons and the policies of the law, than on legal abstractions about the nature of title or agreement. Still, those legal concepts are powerful tools for undermining a clause of which the court disapproves on policy grounds. Hence, the stated legal rationale for a court's shrink-wrap licensing decision may be that there was no true agreement or that title cannot be retained without maintaining the incidents of title or performing particular ceremonies. The motivating force for the decision may actually relate more closely, however, to another set of considerations which are discussed below.

III. ARE ANTI-RENTAL CLAUSES EFFECTIVE?

Anti-rental Clauses

Suppressing rentals is the rationale of shrink-wrap licensing. Ashton-Tate's and Lifetree's licenses illustrate two approaches to anti-rental clauses.[26]

Ashton-Tate explicitly states that the purchaser agrees not to rent the product.[27] This is certainly clear, and a court would be unlikely to ignore it.

While Lifetree states in one clause that a licensee is not permitted to rent the software,[28] in another clause it says that LSI has no control over licensee's use of the product.[29] Clearly, an unsympathetic court could readily conclude that the latter clause undermines or disclaims

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or for the benefit of, the licensor, there is no duty of the consumer to do as the licensor desires.

26. MicroPro has no anti-rental clause. It simply relies on its "ownership" of the software, and its failure to "authorize" the customer/bailee to rent out the bailor's property. *Infra* app. III. Microsoft has a clause stating, "You may not distribute copies of the program," and another stating, "You may not . . . transfer the program . . . ." *Infra* app. IV.

27. Clause 3 states "You further agree not to transfer, sublicense, share, rent, or lease the materials or copies thereof. . . ." *Infra* app. I.

28. Clause 5 states "Licensee is not licensed to rent, lease, transfer, network, reproduce or distribute this software." *Infra* app. II.

29. *Id.*

the first. Moreover, failing to license the customer to rent is not as strong as Ashton-Tate's "agreement" with the customer that it shall not rent.[30] The customer may not *need* a license giving it permission to rent.

Objections to Rental

Rental is the most discussed issue in shrink-wrap licensing. There are many theoretical justifications for and theoretical objections against rental of software. Rental companies say that end-users are entitled to try expensive software out before buying it so that they may determine whether it suits their needs. Software marketers argue that rentals may replace sales to temporary users of computer programs who would otherwise buy copies.[31] There are many other similar arguments, which are equally irrelevant. They focus on hypothetical fact situations.

The legitimate objection is that software "rental" is generally merely a euphemism for "software piracy," even though this cannot be legally proved.[32] Indeed, if the rental companies did no more than give customers a chance to try out expensive software before buying it, which is what they claim they do, they would be performing a public service and would deserve encouragement rather than suppression. Unfortunately, that is not what happens. Renters make copies of software available to customers, who may then make unauthorized copies in the undetectable privacy of their homes. The possibility of the legitimate occurrence, however, as well as the fact that the burden of proof of copying is on the plaintiff, would result in the plaintiff losing the case. Accordingly, ordinary copyright law remedies are out of the software proprietor's reach. The shrink-wrap "contract," however, offers a host of possibilities.

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30. *See supra* note 27 and accompanying text.

31. For example, someone might rent a game for a few days or weeks until boredom sets in; but for the availability of the rental, the user might be induced to purchase the game software and then discard it. Certainly, many books are sold to people who read them only once or a few times. This argument has no application to such programs as word processors, data base management systems, accounting programs, operating systems, debuggers and compilers. Such programs are tools, not toys. Moreover, the investment in learning to use the program is too great to justify temporary use via occasional rentals.

32. The renter makes software readily and privately available to an end user who is free to copy it, if he wishes, but the software proprietor probably cannot prove by a preponderance of the evidence that any copying occurred, and that the renter knowingly caused the copying.

The Attractions of the Shrink-Wrap Solution

Given a shrink-wrap license with anti-rental provisions, the software proprietor may assert that the renter breached a bilateral contract by renting out the software. Actual damages might be hard to prove, and punitive damages for breach of contract are unavailable in most states, but the chance for a permanent injunction is quite good; future breaches, if they occur, are likely to result in contempt-of-court fines for the defendant. Moreover, once the concept of a quasi-consensual contract is introduced, other clauses might be used to bolster the software proprietor's anti-rental position.[33]

Policy Issues

The courts will probably find that the anti-rental clause is the most acceptable (or least unacceptable, for it may still be rejected) of the restrictive software licensing clauses, because it is the most readily justified, as long as it is not encumbered with overreaching related clauses. The software proprietor has a legitimate problem—the renter's facilitation of piracy—with which existing copyright law cannot satisfactorily deal. However, it is very likely that so drastic a measure is not necessary for solving this problem, or is less acceptable than is failure to solve the problem.

It is not possible to speak sensibly about anti-rental without addressing the implications of retention of title.[34] Unless it is assumed that rental means piracy, even when that cannot be proved by evidence, the courts are likely to hold that so flimsy a device as purported title retention via a shrink-wrap license cannot justify denying the purchaser of a copyrighted product the right to use the product as he or she wishes.[35] A good deal of balancing the interests of the public in what they pay for in the marketplace against the investment interests of copyright owners has gone on in the courts and Congress over the last hundred years.

33. Some possibilities are choice-of-law and choice-of-forum clauses. Liquidated damages, and an acknowledgment that breach of contract will irreparably injure the software proprietor are also possibilities. An ambitious software proprietor might even try having the other contracting party "consent" to having the Secretary of State of the software proprietor's home state become agent for service of process in any action on the contract.

34. *See supra* text accompanying note 12.

35. The courts cannot properly make legislative findings or take "notice" of disputed issues of fact.

The balances thus struck have been codified into the Copyright Act.[36] To restrike such balances is not the business of courts.[37]

Section 109(a) of the 1976 Copyright Act,[38] and a great deal of antecedent case law, hold that the copyright owner's first sale of a copyrighted article divests the copyright owner of any right to control further distribution of the article and possibly also divests the copyright owner of any power to control any other disposition or use of the article.[39] For example, a greeting card manufacturer cannot stop the purchaser of the card from pasting the card onto a piece of china and from then selling the resulting product as a wall plaque.[40] He can, of course, prevent the purchaser from making a new copy of the picture and putting that onto the piece of china, but there is nothing that he can do to control the purchaser's disposition or use of the same copy that he bought, and the purchaser cannot be prevented from renting out the card or plaque.

Illustrative of this doctrine is the decision in *Bobbs-Merrill Co. v. Straus.*[41] Bobbs-Merrill, a book publisher, sold books with this notice printed on them:

> The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.[42]

R.H. Macy sold copies of the book for eighty-nine cents. Bobbs-Merrill sued for copyright infringement, seeking an injunction against further

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36. 17 U.S.C. §§ 101-810 (1982).

37. *See supra* note 35.

38. "[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a) (1982).

39. Use, without more, is wholly outside present copyright laws. Unlike the patent laws, which give inventors the exclusive right to make, sell, and use the invention, the copyright laws give only the exclusive right to make ("reproduce") and sell the copyrighted work. *See, e.g.*, Bauer & Cie v. O'Donnell, 229 U.S. 1, 13-14 (1913). There has been great resistance to creating use rights under the copyright laws, without much articulation of why such rights are a bad idea. *See, e.g.*, S. REP. NO. 98-425, 98th Cong., 2d Sess. 20-21 (1984); H. REP. NO. 98-781, 98th Cong., 2d Sess. 21 n.40 (1984) (concerning extension of copyright protection to semiconductor chips, and specifically excluding use rights).

40. C.M. Paula Co. v. Logan, 355 F. Supp. 189 (N.D. Tex. 1973).

41. 210 U.S. 339 (1908).

42. *Id.* at 341.

sales at a price less than one dollar.[43] The Court refused relief on the ground that Bobbs-Merrill had sold the book, thereby fully exercising or exhausting its statutory exclusive right to vend the copyrighted work. The fact that Bobbs-Merrill sought to qualify the rights of purchasers by reserving the right to sue for copyright infringement, if the purchaser resold the book for less than one dollar, was without effect:

> To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning . . . .[44]

The Court rested its decision entirely on the copyright laws and expressly stated that it did not examine the validity of the supposed quasi-consensual contract or whether it violated the antitrust laws.[45] The Supreme Court's *Bobbs-Merrill* opinion, read strictly, probably stands only for the proposition that Macy did not commit copyright infringement by disregarding the 1908 version of a shrink-wrap license. Bobbs-Merrill did not rely on the contract to secure specific performance; it relied on the copyright law.[46] Nonetheless, the language used in the opinion's refusal to apply the copyright laws to enforce the quasi-consensual license strongly suggests a general disapproval of such licenses.[47]

A few years later, in *Straus v. Victor Talking Machine Co.*,[48] Macy again successfully disregarded a similar early version of a shrink-wrap license—this time on a patented phonograph. Victor retained title and

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43. In the Supreme Court, Bobbs-Merrill sought relief under the copyright law, not under the contract. *Id.* at 339, 340 & 342.

44. *Id.* at 351.

45. *Id.*

46. *See supra* note 43. The Second Circuit had held that the notice and Macy's purchase of the book with knowledge of the notice did not create a contract. Bobbs-Merrill v. Strauss, 147 F. 15, 27 (1906). The court observed that Macy did not assent to the notice or agree that its ownership of the books was qualified or less than absolute, and that the notice did not effect a reservation of title to the copies sold. The Second Circuit also said that even if a notice could annex a condition to Bobbs-Merrill's sale to wholesalers, and even if the condition passed to Macy when it bought the books, the notice was still defective, because all it did was retain the illusory right to treat violation of the notice as a copyright infringement; that "supposed right" did not exist. *Id.* at 27-28.

47. "If the statutory owner desires after publication to control the lawfully published copies, such control can only be secured by means of positive contract or conditions, so accepted by the party to be charged or so brought to his knowledge that it would be inequitable to permit him to violate them." *Id.* at 22.

48. 243 U.S. 490 (1917).

licensed the use of its machines with "license notices" attached to them, providing that dealers might sublicense their customers to use the machines, but only for a royalty of at least two hundred dollars.[49] Macy procured phonographs and sold them for much less than this price. Victor sued for patent infringement, seeking damages and an injunction. The Court held that it would not treat Victor's notice as a license, because it lacked major characteristics of a genuine license.[50] First, Victor received all of its money in advance; it was a paid-up license.[51] Second, Victor's purported retention of title by means of the license was a sham. There was no public recording of a security interest in the goods, and no policing of licensees who might remove the machines from one place to another.[52] Finally, the duration of the license was so long that the machines probably would have worn out or become obsolete by the time it ended.[53] In short, the "license" was a euphemism for a price-fixing scheme, rather than a transaction with the characteristics of a conventional license.

A year later, in *Boston Store v. American Graphophone Co.*,[54] the Court condemned another such scheme. Boston Store signed a contract expressly agreeing that it would abide by a notice similar to those Macy had flouted in the earlier two cases.[55] Boston Store then cut prices, and American sued for patent infringement and for specific performance under the contract.[56] This contract was no mere shrink-wrap notice, but an undeniable bilateral contract. The Court nonetheless ruled that disregarding American's license was not patent infringement and the patentee could not by contract reserve the power to set resale prices.[57] In considering the question of whether patentees had any power "to sell and yet under the guise of license . . . put restrictions which in substance were repugnant to the rights which necessarily arose from the sale which was made,"[58] the Court found that payment to the patentee for the product exhausted all of the patentee's rights over the use or

49. *Id.* at 495.
50. *Id.* at 500-01.
51. *Id.* at 498. Apparently the Court considered paid-up licenses to be suspect.
52. *Id.* at 498-99.
53. *Id.* at 499-500.
54. 246 U.S. 8 (1918).
55. *Id.* at 18-19.
56. *Id.* at 20.
57. *Id.* at 27.
58. *Id.* at 24.

disposition of the product.[59] Apparently, this meant that the contract was unenforceable because it contravened a policy of the law balancing patentees' rights against customers' rights. The balance was not to be readjusted by contract, presumably on grounds similar to those relied on by some states in refusing to permit disclaimers of certain warranties.

To be sure, suppression of rental is not the same thing as suppression of retail price competition. Macy's and Boston's battles were against price-fixers who used "license" as a euphemism for their schemes. The flavor of these and later opinions is that the Court will not allow the nominal form of a transaction (particularly, designating a sale as a "license to use") to govern the outcome.[60] If the reasoning of the *Victor* case[61] is applied to anti-rental clauses of shrink-wrap software licenses, the result is devastating. First, the software proprietor has received full payment. Second, there is no public recording of a security interest and no policing of the whereabouts of the licensed material. The duration of the license is perpetual. Finally, the reason for the license is to suppress rental, rather than to facilitate an ongoing business or industrial transaction. Suppressing copyright infringement or piracy is legitimate, but the courts probably will refuse to equate rental with contributory infringement of copyrights, because it would appear as if a legitimate business were being suppressed.

It seems more likely than not that section 109(a) of the Copyright Act, and the case law it codifies,[62] amount to much more than a neutral statement of the legal consequences of structuring a transaction as a sale rather than as a bailment. Instead, they appear to reflect a policy under which customers are entitled to unfettered use of copyrighted articles for which they pay money to the copyright owner.[63] This policy may give way to other policies such as facilitation of credit sales by allowing

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59. *Id.* at 25.

60. *See, e.g.*, United States v. Masonite Corp., 316 U.S. 265, 278 (1942).

61. *See supra* note 48 and accompanying text.

62. *See supra* notes 38 & 39.

63. *See, e.g.*, the language of the House Report for Pub. L. 98-620, H. REP. NO. 98-781, 98th Cong., 2d Sess. 23 (1984): "Section 906(b) carries over to mask works the 'exhaustion of monopoly rights' and 'first sale' doctrine of 17 U.S.C. § 109(a) and many years of case law. As in the case of copyrighted products, the owner of a mask work has no right to try to exercise 'remote control' over the pricing or other business conduct of its . . . customers, once the [products] have passed into their hands. Except where the Congress expressly orders otherwise, the exhaustion of any rights by the first authorized sale is a basic tenet of our intellectual property laws. *See* Bobbs-Merrill Co. v. Strauss. . . ."

sellers to keep a security interest, but when no other such policy is visibly at stake a court will be quite likely to enforce the policy of section 109(a). Efforts to make that policy inapplicable by using a nonsale format are likely to be defeated as attempts to evade the law and its policies. Even an express agreement may be denied effect, as was the result in the *Boston Store* case.[64] In most cases, however, a court will find that no agreement was reached between the parties.[65]

Anti-rental clauses in shrink-wrap licenses will very likely prove ineffective in court. The foreground music of tyrannical interference with customers' rights to use their personal property as they see fit is too likely to drown out the background music of software piracy.

Solutions

The only sensible solution is to appeal to Congress to enact a narrowly drawn law that deals with the specific rental/piracy problem, and avoids disturbing any adjacent areas of copyright law. One approach would be to add "rental" as a separate right to the catalog of exclusive rights. Under this theory, a first sale of a copyrighted work would exhaust only the distribution right and would not exhaust any separate "rental" right. Any rental not authorized by the copyright owner would be a violation of one of the copyright owner's exclusive rights and, thus, a copyright infringement.[66]

Another approach is to expressly limit the first sale doctrine, in the case of computer software, so that it does not exhaust the software proprietor's power to convey only a qualified or limited ownership of what is sold. The qualification of the sale would be that rental rights are withheld.

The author's preference would be to add a new section on software rental to the Copyright Act, rather than modify the existing sections of the Act dealing with exclusive rights[67] and first sale.[68] This approach minimizes the likelihood of inadvertently changing the law regarding nonsoftware matters.[69] A proposal for such a section is set out below:

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64. *See supra* note 54.

65. *See, e.g.*, note 46 and accompanying text.

66. A bill to this effect was introduced into the 98th Congress, but it was not acted on. *See* S. 3074, 98th Cong., 2d Sess. (1984).

67. 17 U.S.C. § 105 (1982).

68. 17 U.S.C. § 109 (1982).

69. There is no demonstrated need to create a general rental right that applies to books, sculpture, paintings, and sheet music, for example.

§ 119. Software rental

(a) Subject to the notice requirements of subsection (b), it shall be unlawful for the owner or possessor of a copy of a computer program to rent it to another person, or otherwise in a business transaction to place it under the control of another person, except in circumstances in which reproduction of another copy is unlikely to occur. Notwithstanding section 109(a) of this chapter, any such rental or placement of a copy of a computer program, without the consent of the owner of copyright in the work (which consent shall not unreasonably be withheld), shall be a copyright infringement.

(b)(1) This section shall apply only when the notice specified in paragraph (2) is placed:

(A) on all copies of the computer program that are larger than 3 inches in any dimension on that the copyright owner knowingly permits to pass out of the owner's control; and

(B) in a clearly visible location on the outside of any other package in which such a copy of the computer program is sold or marketed, and is placed in the display, if any, caused by the computer program when it is in use.

(2) The form of such notice shall be: "Unauthorized rental of this software is prohibited by federal law. Copying rented copies of this software is also prohibited by federal law."

This proposal attempts minimal tampering with existing law and the present balance of conflicting interests. In the first sentence of subsection (a), the prohibition is limited to "business transactions" in order to avoid bringing the machinery of the law to bear on consumers' secret evasions of the copyright laws.[70] The reason for including other business transactions besides those labeled as "rentals" is that evasive devices are practicable.[71] The basic thrust of subsection (a) is to reallocate the burden of proof on contributory copyright infringement in rental— the problem that led to shrink-wrap licensing in the first place. If the rental company can show that its rental activity is *not* a euphemism for copyright infringement, it should be allowed to rent. That is, a supposed right of the software proprietor to share the profits from true rentals is not part of the rationale of this proposal. If such a right is justified, however, the proposal should be redesigned.

Subsection (b) provides a fair warning notice to all parties concerned, including consumers. The notice is required for diskettes (but not

70. Commercial piracy can be stamped out without appearing to threaten individual privacy.

71. For example, very liberal return policies after the purchaser has kept the software for two weeks, during which copies were made, could create problems similar to those of rental.

ROMs),[72] for the software package (presumably, a shrink-wrap package), and the visual display on the screen. Like warranty disclaimers, such notice forms should be fairly standardized to prevent confusion.

The case for such legislation is quite strong. Software proprietors have a far stronger claim of being victimized than others now seeking copyright amendments against rentals. The evil at which the proposed software rental legislation is aimed is piracy, not just a demand for a piece of somebody else's pie. The argument against a narrow software anti-rental law seems nonexistent. A legislative solution makes much more sense here than does the judicial legislation which results from the enforcement of shrink-wrap licenses with anti-rental clauses.

IV. ARE ANTI-MODIFICATION CLAUSES EFFECTIVE?

Another group of shrink-wrap licensing restrictive clauses limits the customers' use of the software or, more specifically, limits what the customers may do to the software. Customers may be forbidden to modify the software, to incorporate ("merge") it into another program, or to "disassemble" it.[73]

No-Modification Clauses

Different types of anti-modification clauses are found in shrink-wrap licenses. For example, Microsoft does not permit a user to modify or translate a program without prior written consent from Microsoft.[74] Lifetree permits the licensee to own the modification that he may make to the software but does not allow him to own the software.[75] Peachtree explicitly denies the right of the licensee to modify the program.[76]

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72. A "ROM," read-only-memory, is a monolithic integrated circuit, or "semiconductor chip," in which a relatively small program is stored. Typically, the package for a ROM is too small to have room for printed notices.

73. "Disassembly" means using a program that turns the unintelligible machine language (object code) of a diskette into a source code printout (usually an assembly code) that can be analyzed and understood. Disassembly is used to facilitate modifying a code, since understanding the code is usually a precondition of modifying it to do something else.

74. *Infra* app. IV.

75. *Infra* app. II, at clause 6.

76. *Infra* app. V. "You may not use, copy, modify, or transfer the program, or any copy, modification, or merged portion . . . except as expressly provided for in this license." The contract further expresses that transferring "possession of any copy, modification or merged portion of the program" automatically terminates the license, and that any merged material "will continue to be the property of" Peachtree. *Id.*

The rationale for no-modification clauses is obscure. Some software proprietors have said that modifications create a nonstandard product in the marketplace, making it difficult for the copyright owner to service customer complaints. It would seem, though, that a clause refusing to honor warranties if the software is modified is a more reasonable response. Perhaps that is impractical in a competitive marketplace, but that needs to be proved, not just asserted, before it is considered a relevant fact. Other software proprietors object to modifications on the ground that "souping up" a computer program may allow the customer to obtain a product of higher value for the price of the original and lower-valued product—in effect, obtaining the added value free. This would prevent the copyright owner from extracting full value.[77]

There is a copyright law policy on the other side, favoring user freedom to modify computer programs. Part of the compromise that led to enactment of the 1980 Copyright Act amendment bringing computer programs under the Act was section 117,[78] a provision guaranteeing owners of copies of computer programs the right to adapt the computer programs.[79] The sparse legislative history of section 117 indicates a concern that customers should be free to modify computer programs to operate on different machines and to incorporate new abilities or features.[80] However, the right of the customer was, for unexplained reasons, changed from a right to be enjoyed by "lawful possessors" of a copy of the computer program to a right to be enjoyed only by "owners" of a copy of the computer program.[81] Arguably, the policy of section 117 favors customers' use of "Yankee ingenuity" to improve computer programs. Evading this policy is something the law should not favor. On the other hand, it can be argued instead that the change of wording from "possessors" to "owners" was intended to create an opportunity for copyright owners to avoid the adaptation right by use of a nonsale format. Whether no-modification clauses are enforceable probably depends on which of these views the tribunal accepts.

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77. Again, this may be conjectural or a rare event, and less absolute responses to the event may be more appropriate.

78. 17 U.S.C. § 117 (1982).

79. "[T]his title does not afford to the owner of copyright in a work any greater or lesser rights . . . than those afforded to works under the law. . . ." *Id. See generally* Stern, *Section 117 of The Copyright Act: Charter of the Software Users' Rights or an Illusory Promise*, to be published in 7 W. NEW ENG. L. REV. — (1985).

80. *See* FINAL REPORT OF THE NAT'L COMM. ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 13 (1978).

81. *Compare id.* at 12 with The Copyright Act, 17 U.S.C. § 117 (1982).

No-Incorporation Clauses

The reason for no-incorporation clauses is also obscure. Clearly, a copyright owner will not want the purchaser to incorporate ("merge") the copyrighted computer program into a larger computer program, which the purchaser then replicates many times and sells. That would simply be copyright infringement or piracy.

But what about the situation where the purchaser buys *n* copies, incorporates them into *n* copies of another computer program, and sells *n* copies of the merged product? Arguments can be made either way. Probably a court would resolve the issue in the following very conceptual way, regardless of the business or engineering considerations involved:

> *Case 1.* The purchaser does not physically re-encode the copyrighted software, beyond a *de minimis* amount, but instead places the other software elsewhere on the same original diskette or storage medium (assuming that there is enough room), so that the second software can refer to the first (or a separate medium is used for the additional software and the CPU transitorily incorporates all the software into random access memory each time it is used). All the software is now sold as a package or unit, and the original diskette or other medium is resold. This case would probably be treated like the greeting card case discussed above.[82]
>
> *Case 2.* The purchaser re-encodes the copyrighted software in order to combine it with other software. This composite is then sold, using a new diskette. The court would probably find a violation of the reproduction right.

Cases 1 and 2, above, could be modified to form another possible incorporation scenario involving only the purchaser's use of the software and storage medium, rather than its resale by the purchaser. Under this scenario the no-incorporation clause should be unenforceable because it conflicts with section 117's adaptation right.[83] Some of the shrink-wrap licenses recognize that this is a different case.[84]

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82. *See supra* note 40 and accompanying text.

83. *See supra* notes 78-79 and accompanying text.

84. For example, Peachtree's anti-modification clause appears to allow a merger of the Peachtree computer program into another computer program without subsequent transfer of the merged product, by providing that such a transfer (but not the merger) automatically terminates the license. *See infra* app. V.

Disassembly Clauses[85]

The purpose of disassembly of a computer code on a diskette or tape is to reverse engineer back to the source code. Until recently, only rarely did any explicit prohibition against such disassembly occur.

Anti-disassembly clauses are sometimes justified on the theory that the software proprietor wishes to retain trade secret status for the underlying source code and to rely on copyright for the object code actually marketed to the public. Although the software proprietor may so wish, that does not mean the wish should be granted. Should an automobile manufacturer be permitted to sell cars with anti-disassembly clauses in order to protect the trade secret status of the car's transmission? Is software different? The secrecy of a mass-marketed product is dubious, at best. Generally, the policy of the law is to favor and encourage reverse engineering.[86] Section 117's adaptation right[87] is in the same vein, and disassembly is often a necessary step preceding adaptation. The trade secret rationale for anti-disassembly clauses is too weak to justify the interference with policies favoring progress in technology, particularly the policy of section 117. Once again, of course, retention of title lurks in the background, for section 117 applies only to "owners" of copies of computer programs.[88]

There is another reason, at times, for using anti-disassembly clauses. Software proprietors never mention it, however. Sometimes, hardware that interfaces properly with a CPU can be designed only by understanding how the operating system software for the CPU is designed. To analyze and understand the operating system software, it is often or usually necessary first to disassemble it back to a source code.[89] If such disassembly can be prevented, competitive manufacture of the hardware

85. Lifetree expressly states: "Licensee agrees not to disassemble or otherwise reverse engineer the SOFTWARE." *Infra* app. II. Microsoft more obscurely states that the licensee may not "translate the program" without Microsoft's written consent. *Infra* app. IV. "Translate" usually means "laterally translate," as from Fortran to Cobol or Pascal. But the term can also mean, less commonly, translate down or up, from source code to object code or vice versa. What Microsoft intended as draftsman of this clause is unclear.

86. *See, e.g.*, R. MILGRIM, TRADE SECRETS in 12 BUSINESS ORGANIZATIONS § 205[2] (1977); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1973); Northern Petrochemical Co. v. Tomlinson, 484 F.2d 1057 (7th Cir. 1973); Hampton v. Blair Mfg. Co., 374 F.2d 969 (8th Cir.), *cert. denied*, 389 U.S. 829 (1967).

87. *See supra* notes 78-79.

88. *See supra* note 78 and accompanying text.

89. Such disassembly permits the analyst to determine the necessary timing relationships between signals and other electronic characteristics that the hardware must have in order to interact "compatibly" with the CPU.

may be discouraged. On balance, the anti-disassembly clauses are the most offensive and economically harmful of all shrink-wrap licensing restrictive clauses.

V. ARE SINGLE CPU CLAUSES EFFECTIVE?

Software proprietors usually believe in charging the customer in accordance with the value of the benefit conferred. The benefit is greater when the computer program is used on several CPUs. Software proprietors, therefore, usually want customers to pay a second fee for the right to use the computer program on a second CPU.[90]

There are other ways to use a computer program on several CPUs. For example, the computer program can be physically retained at one CPU location that can be electronically linked (via telephone line and modems)[91] to another CPU, and the computer program can then be temporarily "downloaded"[92] into the memory of the second CPU. Thus, Microsoft provides: "You may not electronically transfer the program from one computer to another over a network."[93]

Single CPU clauses are hardly outrageous. The seller wants to charge more to those customers to whom the product is more valuable because they use it more. It is impractical to put a meter on the customer. Hence, the single CPU clause. This is a context in which, it would seem, courts will be less eager to strike down shrink-wrap licensing. First, the seller's reason for using the clause is at least arguably justifiable. Second, the setting is most often a commercial business.[94] To be sure, user clubs may violate single CPU clauses, but policing them and

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90. Thus, MicroPro states:

> You may use the Software only on a single computer. . . . If you wish to use the Software on more than one computer system, you must either license an additional copy of the Software . . . or request a multi-use license from MicroPro.

Infra app. III. Microsoft tersely states: "This program can only be used on a single computer." *Infra* app. IV. Peachtree states that "the Program may be used by you only on a single computer." *Infra* app. V. Ashton-Tate admonishes: "If you wish to use dBASE II on more than one computer system, you must . . . license another copy . . . ." There certainly is little ambiguity here. *Infra* app. I.

91. A "modem" (modulator-demodulator) is a device for transmitting electronically encoded information between two sites.

92. To "download" is to take information from another source, such as from a CPU, such as via a modem, and place it in a local storage unit, such as part of a CPU receiving information from a modem.

93. *Infra* app. IV.

94. Usually, only commercial enterprises (and computer science departments of universities) have multiple CPUs.

suing them is rarely justifiable on a cost/benefit basis. A commercial setting lacks the harsh background music of oppressiveness, inability to understand the contract, and contracts of adhesion that so often filters through to the court when dealings with consumers are concerned.[95]

CONCLUSION

What this suggests, however, is that there ought to be a more overt and publicly stated theory for deciding cases of this type. Would it not be better to decide whether shrink-wrap licensing is effective in particular contexts on the basis of what are and what are not reasonable restrictions for software proprietors to impose on their customers? Surely, it cannot be better to decide these cases by invoking the mysticism of title, by ascertaining whether the true nature of software is goods or services, and by psychoanalyzing the meeting of minds that does or does not occur when the customer tears open the plastic wrapping.

A reasonable approach to resolving this issue is by expanding upon the suggestion made earlier in this article as to rental, that is, drafting a small Uniform Commercial Code for software which could be located in the copyright law or elsewhere. The interplay with federal concerns, the consequent problems of preemption by copyright law, and the business need for uniformity may well require a federal law rather than a state law or an addendum to the Uniform Commercial Code. Moreover, the kinds of restrictions on software use that software proprietors have attempted to impose on their customers by means of shrink-wrap licensing invite recognition that *use* is important for software in a way that it is not important for books and other traditional subject matter of copyright. Therefore, there could easily be a qualified use right for software which acts somewhat as the use right of patent law does for patented articles. The issue could then be redrawn to determine which limitations on use are reasonable (usually, because they are necessary and ancillary to carrying out the main transaction) and which are unreasonable—a better question to try to answer than the ones that shrink-wrap licensing poses. In any event, common law evolution of

95. It would not be surprising, therefore, if the same court that in a transaction where the end user was a consumer would hold: (1) no expression of "agreement"; (2) no license because the earmarks of a license are missing; and (3) ambiguity too great for a true meeting of minds—would in a commercial context find an enforceable bilateral agreement.

doctrine is so slow and inefficient here that only a legislative solution, if any, can succeed.

APPENDIX I

ASHTON-TATE
10150 WEST JEFFERSON BOULEVARD
CULVER CITY, CALIFORNIA 90230

Serial No._____

LIMITED USE SOFTWARE LICENSE AGREEMENT LIMITED WARRANTY AND UPDATE POLICY

Thank you for selecting dBASE II® for your microcomputer. We at Ashton-Tate believe that dBASE II is an outstanding product and appreciate your confidence.

This card contains the dBASE II Limited Use Software License Agreement and states Ashton-Tate's Warranty and Update Policy. Once you have read this license agreement and have agreed to its terms, please complete and sign below. Once this card is signed by you and returned to Ashton-Tate, this will be the agreement between us governing the use of dBASE II. **You agree that by opening the sealed plastic bag containing the dBASE II system diskette you show your acceptance of the terms of this license agreement.**

dBASE II LIMITED USE LICENSE AGREEMENT

1. Grant of License. Ashton-Tate hereby grants to you and you accept a license to use dBASE II and related materials (dBASE II, the User Manual and the related materials are collectively referred to as "Materials") delivered with this license agreement, on a single computer, or on a subsequent but not additional computer. You agree that you will not transfer, sub-license, share, rent or lease your rights under this agreement, and Ashton-Tate reserves the right to license other persons or firms to use dBASE II. A sealed copy of dBASE II is being furnished to you with this license agreement in computer readable format, and on magnetic medium. If you wish to use dBASE II on more than one computer system, you must either license another copy of dBASE II or request a multi-use license from Ashton-Tate.

2. Term. This license agreement is effective from the day you open the sealed package containing the magnetic medium on which dBASE II is recorded, and continues until you return to Aston-Tate the original Materials, and all copies of the program, and other proprietary materials.

3. Aston-Tate's Rights. You acknowledge that the Materials are the sole and exclusive property of Ashton-Tate. By accepting this license, you do not become the owner of the Materials, but you do have the right to use the Materials as outlined and limited in this agreement. You further agree not to transfer, sub-license, share, rent, or lease the Materials, or copies thereof, in any form to any person or firm without the prior written consent of Ashton-Tate. You will use your best efforts and take all reasonable steps to protect the Materials from unauthorized reproduction, publication, disclosure or distribution. The Materi-

als contain valuable confidential, unpublished information and trade secrets developed or acquired by Ashton-Tate.

4. Your Agreement. You agree not to copy the Materials received from Ashton-Tate, in whole or in part, except for backup or archive purposes, unless Ashton-Tate consents in writing. No more than five (5) copies may be in existence under this license agreement at any time.

5. Limited Warranty. Ashton-Tate warrants the magnetic diskette on which dBASE II is recorded, as well as related printed materials, to be free from defects in materials or faulty workmanship, in normal use and service for a period of ninety (90) days from the effective day of this agreement. If, during this ninety day period, a defect in the diskette should appear, the diskette may be returned to Ashton-Tate for replacement without charge, provided that you have returned your limited use license acknowledgement card.

EXCEPT FOR THE WARRANTY DESCRIBED IN THIS PARAGRAPH, THERE ARE NO WARRANTIES EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ALL SUCH WARRANTIES ARE EXPRESSLY AND SPECIFICALLY DISCLAIMED.

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IN NO EVENT SHALL ASHTON-TATE BE RESPONSIBLE FOR ANY INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES OR LOST PROFITS, EVEN IF ASHTON-TATE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.

SOME STATES DO NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU.

7. Updates. If the version of dBASE II that you obtain from your vendor is not current as of the date of your receipt, Ashton-Tate will send you the latest version at no charge. We will also notify you of any subsequent updates and the price for which they may be licensed to you. You agree that all updates which may be provided to you shall become part of the Materials and be governed by the terms of this licensing agreement.

8. Governing Law. This License Agreement is to be governed by and interpreted in accordance with the laws of the State of California. If any provision of this license agreement in any way contravenes the Laws of the State or jurisdiction in which this license agreement is to be performed, such provisions shall be deemed to be deleted and, if any term of this license agreement shall be declared by final adjudication to be illegal or contrary to public policy, it shall not affect the validity of any other term or provision of this license agreement.

9. Attorneys' Fees. If any legal action is brought by either party to this license agreement against the other party regarding the subject matter of this

license agreement, the prevailing party shall be entitled to recover, in addition to any other relief, reasonable attorneys' fees and expenses.

10. Whole Agreement. This license agreement constitutes the entire agreement between you and Ashton-Tate reegarding the licensed Materials.

For Ashton-Tate

s/David Cole	s/George Tate
David Cole, President and Chief Executive Officer	George Tate, Chairman of the Board

I acknowledge that I have read and I agree to all the terms and conditions of the dBASE II Limited Use Licensing Agreement/Limited Warranty and Update Policy

Signature_____ Date_____

dBASE II is a registered trademark of Ashton-Tate DB/LIC 617 June 17, 1983

Serial No. _____

ASHTON-TATE™
SOFTWARE
LICENSE
AGREEMENT
FOR A SINGLE USER MICROCOMPUTER

READ THIS PAGE CAREFULLY NOW, before opening the sealed diskette package. YOU AGREE THAT BY OPENING THE SEALED DISKETTE PACKAGE YOU HAVE SHOWN AGREEMENT TO THE LICENSE TERMS BY YOU AND ANY OTHER USER OF THIS SOFTWARE. (If you don't wish to enter this agreement, return this package with the sealed disketted package unopened to your dealer with your receipt for a full refund.)

1. What's In This Package? The Materials inside are (a) a copy of dBASE III on diskette sealed in a separate clear wrapper, plus (b) our User Manual, (c) diskette-based sample programs and utilities, and (d) a backup copy of the system diskette.

2. Refund Policy. If you cannot agree to this license, you have three (3) days to obtain a full refund, by returning the package and your receipt to your authorized dealer (provided you have not opened the separate clear wrapper containing the dBASE III system diskette and back-up diskette).

3. Support. Contact your dealer first for assistance in installing or using the software. Also, after you return the Registration Card, Ashton-Tate ("we") will provide you reasonable telephone support during our business hours (P.S.T.) on questions unaddressed by your dealer or the User Manual.

4. Backups and Copying. You agree not to copy any of the Materials, and understand that the dBASE III system diskette is copy-protected. If your system diskette becomes damaged, we will replace it without charge within ninety days of your receipt, and for a twenty dollar handling and materials charge thereafter; just send in the damaged diskette (and charge, if applicable), and we will send you the replacement within two business days of its receipt by us. You may, however, make up to three copies of the sample programs/utilities and demo disks, provided you copy the information on their labels onto the backup labels and keep possession of the backups.

5. Updates. If this copy of dBASE III is not the current version on you receipt date, we will send you the latest version free; just send us your completed Registration Card and photocopies of your original diskette label and receipt. Updates are available only if a completed Registration Card is on file with us.

6. Grant of Limited Use License. Ashton-Tate grants you a paid-up, personal license to use the enclosed machine-readable (object code) copy of dBASE III and the other Materials on a single or subsequent (but not additional) microcomputer, subject to the license terms. You agree not to, without our prior written consent, (a) rent, lease, lend, sub-license, or otherwise transfer the Materials or your rights hereunder; (b) remove or obscure our proprietary

rights notices; (c) alter, decompile, or disassemble the programs; (d) utilize dBASE III on any service bureau, time-sharing, or interactive cable system; or (e) use dBASE III on more than one terminal or workstation of a network of single user microcomputers or a multi-user computer. (For multi-user microcomputers, contact us regarding the latest multi-user database product.)

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8. Limited Warranty and Liability. You acknowledge that, since we can't control your choice of software or your microcomputing habits, it is your responsibility to (a) select programs that meet your needs; (b) make backups of your data and programs regularly; (c) choose, maintain, and match your hardware, operating system software, and other applications software; and (d) install, use, and obtain results, from dBASE III. dBASE III is licensed "as is". We cannot guarantee you uninterrupted service or the correction of any errors.

We warrant the original dBASE III system diskette and printed Materials to be free from defective materials or workmanship in normal use for ninety days from your receipt from our authorized dealer. If a defect appears during the limited warranty period, return the diskette or Manual pages to us with a photocopy of your original diskette label and your receipt for free replacement.

If you discover what you think is a significant logic error in the software that prevents its operation, send us a detailed description of the possible problem (so we can try to reproduce it), with a system diskette within sixty days of your receipt of the Materials. We will attempt to correct or bypass any actual, reproducible error that prevents a program function from operating properly, by providing you corrective or workaround instructions, a corrected copy, or Manual substitute pages or addenda within a reasonable time. If we can't, we will send you a refund authorization (to deliver to your dealer, with a copy of your receipt). This does not cover software altered without authorization, or require us to customize our programs, develop new features, or modify your copy for different hardware or operating system software. Paragraph 8 provides your exclusive remedy for any problems with the Materials.

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9. Term. This License Agreement is effective from the day you open the package. Your license continues for fifty years or until your returning to us the original Materials whichever occurs first. If you breach this agreement we may terminate this license upon written notice, in addition to enforcing our other legal rights; you must then return all Materials.

10. General. This agreement will be governed by California law (except federal law governs copyrights and registered trademarks). If any provision hereof is finally held to contravene that jurisdiction's law, that provision will be deemed deleted, but will not affect any other provision's validity; the parties expressly agree that every limitation of liability, disclaimer of warranties, or exclusion of damages is intended to be severable and independent of any other such provision and to be enforced as such, and shall remain in effect even if a remedy is held to have failed of its essential purpose. If either party brings an action to enforce or interpret this agreement, the prevailing party will be entitled to recover reasonable attorneys' fees and litigation expenses in addition to other appropriate relief. This agreement covers any updates, backups, and merged or partial copies of the programs, and constitutes our entire understanding and agreement regarding the Materials. Any prior purchase order, communications, advertising, or representations are superseded. This license may only be modified in a written amendment signed by an authorized Ashton-Tate officer. No action for any warranty breach or otherwise arising under this license may be commenced more than one year following warranty expiration. Either party's failure or delay to enforce any provision hereof will not waive that party's rights. Your confidential information obligations will survive any agreement termination. You acknowledge that you have read, understood, and agreed to the license terms.

Again, *thanks* for choosing dBASE III!

THANKS FOR SELECTING THE dBASE III™ DATABASE MANAGEMENT SYSTEM FOR YOUR MICROCOMPUTER. WE AT ASHTON-TATE™ BELIEVE THAT dBASE III IS AN OUTSTANDING PRODUCT, AND WE APPRECIATE YOUR CONFIDENCE.

s/David Cole
David Cole, President & Chief Executive Officer

s/George Tate
George Tate, Chairman of the Board

ASK YOUR SALESPERSON FOR A DEMONSTRATION! dBASE, dBASE III, and Ashton-Tate are trademarks of Ashton-Tate.
PLEASE MAKE A RECORD OF YOUR SERIAL # AND INCLUDE IT ON ANY CORRESPONDENCE.
Ashton-Tate, 10150 West Jefferson Blvd., Culver City, CA 90230.

APPENDIX II

LIFETREE SOFTWARE INC. SINGLE-SYSTEM END USER OBJECT CODE SOFTWARE LICENSE AGREEMENT

DO NOT OPEN THE SOFTWARE MEDIA PACKAGE UNTIL YOU HAVE READ THIS LICENSE AGREEMENT AND THE SOFTWARE DOCUMENTATION WITH CARE.

IT IS YOUR RESPONSIBILITY TO REVIEW THE DOCUMENTATION AND DETERMINE WHETHER THIS SOFTWARE MEETS YOUR REQUIREMENTS BEFORE YOU OPEN THE MEDIA PACKAGE. AS LONG AS THE MEDIA SEAL HAS NOT BEEN BROKEN, YOU MAY RETURN THE SOFTWARE PACKAGE TO YOUR DEALER FOR EXCHANGE OR A REFUND WITHIN SEVEN (7) DAYS OF YOUR RECEIPT OF THE SOFTWARE.

LIFETREE SOFTWARE INC. and LICENSEE have agreed, by LICENSEE's act of opening the sealed diskette package or by LICENSEE's use of the SOFTWARE, that LICENSOR's grant to LICENSEE of the right to use and possession of this SOFTWARE product shall be subject to the following terms and conditions:

1. DEFINITIONS OF TERMS USED—

A. "LSI" and "LICENSOR" mean LIFETREE SOFTWARE INC., a California corporation with its principal office located at the Pacific Professional Building, 411 Pacific Street, Monterey, California 93940, the owner of the copyright on the SOFTWARE and DOCUMENTATION or their licensed publisher.

B. "LICENSEE" means the individual or the business entity licensing this copy of the SOFTWARE and includes those persons in LICENSEE's immediate organization such as business associates, partners and employees who are authorized to use this copy on the COMPUTER under the terms of this Agreement.

C. "COMPUTER" is the single microcomputer system, utilizing a single processor or a co-processor, on which LICENSEE is licensed to use this SOFTWARE. Multiple CPU systems, networking or emulations on mainframe or *mini-computers require supplementary licenses.*

D. "SOFTWARE" is the set of object code computer programs provided in this package, regardless of the form in which LICENSEE may subsequently use it, and regardless of any modification which LICENSEE may make to it.

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By: CAMILO WILSON, President

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MicroPro®

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